SUPREME COURT OF APPEALS OF VIRGINIA.

DEATRICK'S ADM'R. *v.* STATE LIFE INS. CO.

Nov. 21, 1907.

[59 S. E. 489.]

1. Writ of Error—Objections in Court Below—Pleading—Issue Joined.—Where a case was voluntarily tried throughout by both parties as though the pleadings had been perfected, plaintiff was estopped to claim on a writ of error that the judgment was unsustainable because no issue had been formally joined on defendant's pleas to the jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1056, 1057.]

2. Pleading—Plea in Abatement—Duplicity.—A plea to the jurisdiction, necessarily negativing every ground of jurisdiction enumerated in the statute, is not bad for duplicity, under the rule that a plea in abatement, pleading two or more distinct and sufficient defenses, either of which, if true, will necessitate a finding for the defendant tendering the plea, is duplicitous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 202.]

3. Courts—Jurisdiction—Plea—Absence of Property.—In an action against a foreign corporation, so much of a plea to the court's jurisdiction as alleged that defendant had no estate or debts due to it within the jurisdiction was immaterial, where there was no attempt to gain jurisdiction by attachment; the only way in which the existence of an estate or debts due the defendant could affect the question of jurisdiction being under the attachmant laws.

4. Same.—Code 1904, § 2959, providing for an attachment of property within the jurisdiction in an action against a nonresident, does not apply to a suit the object of which is not to attach particular property, but to acquire general jurisdiction of defendant, so as to authorize a personal judgment against it.

5. Pleading—Plea in Abatement—Better Writ.—A plea in abatement to the jurisdiction is not objectionable for failure to give plaintiff a better writ by showing a more proper or sufficient jurisdiction in some other court, where the plea shows facts under which no court in the state has jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 214.]

6. Corporations—Foreign Corporations—Actions.—A corporation may be sued on a transitory cause of action wherever it is doing

business in such a manner or to such an extent as to warrant the inference that it is there present through its agents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2568.]

7. Constitutional Law—Privileges of Citizens—Right to Sue.—Where a citizen of a state is authorized to sue a foreign corporation therein, a nonresident is entitled to a similar privilege under Const. U. S. art. 4, § 2, providing that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 646.]

8. Corporations—Foreign Corporations—Actions—Process—Service Outside County.—Since some of the grounds of jurisdiction enumerated by Code 1904, §§ 3214, 3215, must appear in order to authorize the issue of process for service in another county, where none of such grounds existed, process could not issue out of the circuit court of Frederick county to be served on a foreign insurance company's resident agent in Richmond, in a suit in which the insurance company was the sole defendant, on a policy on the life of a person who did not reside in Frederick county either at the time the policy was issued or at the date of his death.

[Ed. Note.—For cases in point, see C it. Dig. vol. 12, Corporations, § 2622.]

Error to Circuit Court, Frederick County.

Action by Parvin E. Deatrick's administrator against the State Life Insurance Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Barton & Boyd, for plaintiff in error.
R. M. Ward, for defendant in error.

KEITH, P. Parvin E. Deatrick, of Martinsburg, W. Va., took out a policy of insurance upon his life in the State Life Insurance Company, of Indianapolis, Ind. Some time after taking out this policy, he died in the city of Martinsburg, W. Va., on January 27, 1905. His estate was committed to J. William Taylor, sergeant of the city of Winchester, Va., who brought suit upon the policy of insurance and filed his declaration to the second February rules, 1906. To the same rules the defendant appeared and filed three pleas in abatement, to the first of which the plaintiff replied, the replication was sus ained, and this plea passed out of the case.

In plea No. 2 the defendant craved oyer of the writ and the return of the officer thereon from which it appears that it was directed to the sheriff of the city of Richmond, and was served by his deputy upon Emmett Seaton, the statutory agent of the de-

fendant company in the city of Richmond. Thereupon the defendant prayed judgment of said writ and the return thereon, because "it appears from the said writ and the return thereon that the defendant is sued alone, and not with any person residing in the county of Frederick; that the writ is directed to the sergeant of the city of Richmond, Va., and was by said officer or his deputy served upon the agent of the defendant corporation within the said city; that at the time the writ was issued and since the defendant was and is a life insurance company, incorporated under the laws of the state of Indiana, and not a resident of the state of Virginia, and that its principal office was and is at Indianapolis, Ind., in which city its chief officer resides; and that plaintiff's decedent, Parvin E. Deatrick, did not reside in said county of Frederick at the date of the said policy of insurance, but that at the date of said policy, as well as at the date of his death, the said Parvin E. Deatrick resided in Martinsburg, in the county of Berkley, and the state of West Virginia; that the defendant has no estate or debts due it within the jurisdiction of the court; and that no such affidavit and publication of process as is prescribed by section 3225 of the Code of Virginia has been made, and this the defendant is ready to verify. Whereof the defendant prays judgment whether this court can or will take any further cognizance of the action aforesaid, and prays judgment of the said writ and return thereon, and that the same may be quashed."

Plea No. 3, leaving out the formal parts, avers that the defendant "is a life insurance company duly incorporated under the laws of the state of Indiana, and that the said supposed cause of action did not, nor did any part thereof, arise in said county of Frederick, nor elsewhere within the state of Virginia, nor did the said plaintiff's decedent, Parvin E. Deatrick, reside in the said county of Frederick at the date of the said policy of insurance, nor at any time prior to or since said date; but that the said supposed cause of action, or some part thereof (if any such cause there be), did arise either within said city of Indianapolis, wherein said alleged contract of insurance was made and effected, or within the county of Berkley, in the state of West Virginia, in which said county plaintiff's decedent, Parvin E. Deatrick, did reside at the time the alleged contract of insurance was made and effected, and wherein the said insured, Parvin E. Deatrick, resided at the time of his death, and in the the court of which said county and state letters of administration upon the estate of said decedent were duly granted prior to the institution of this action, and wherein his personal representative, so appointed, qualified and has since resided, and that no court of the state of Virginia has jurisdiction over he said al-

leged cause of action; and this the defendant is ready to verify. Wherefore he prays judgment whether this court can or will take any further cognizance of the action aforesaid."

At the April term, 1906, the plaintiff, by its attorney, moved the court to reject pleas in abatement Nos. 2 and 3, and at the same term the following order was entered: "And the court, having heard the argument of counsel upon the motions of the plaintiff to reject pleas in abatement 2 and 3, doth deny said motions. Thereupon the plaintiff replied generally to pleas in abatement 2 and 3, and this case is continued until the next term of this court for trial of the issues upon the said two pleas. And the defendant moved the court to quash the writ and the return thereon and the court, being of opinion that the same matters of law and fact are presented in the pleas in abatement, doth overrule said motion until the court passes upon said pleas."

And at the June term the following order was entered: "This day came again the parties by their attorneys, and neither party requiring a jury, but agreeing to submit all matters of law and fact to the court, and the court, having fully heard the evidence upon the issues made up at the April term, 1906, of this court, and on the motion to quash the writ, is of the opinion to sustain the pleas in abatement, and the motion to quash the writ in this case; and thereupon, for reasons stated in a written opinion made a part of this record, it is ordered that the said writ be quashed and the action of the plaintiff abated, and that he pay to the defendant its costs in this behalf sustained. To which ruling of the court the plaintiff excepted and tendered his bill of exceptions, and asks that the same be signed, sealed, and enrolled, which is accordingly done."

To this judgment a writ of error was obtained from this court.

The first order assigned is that no issue was joined upon the pleas; and, strictly speaking, this seems to be true. There was no formal joinder of issue, but it appears that the court, the plaintiff, and the defendant dealt with the case as though the pleadings had been perfected. The evidence was introduced, and the case argued by counsel, and considered by the court just as would have done had the utmost formality in pleading been observed. It is certain, therefore, that the omission caused no injury to the plaintiff.

In Keator Lumber Co. *v.* Thompson, 144 U. S. 434, 12 Sup. Ct. 669, 36 L. Ed. 495, Mr. Justice Harlan, delivering the opinion of the court, said: "The objection that replications were not filed when the trial commenced, nor before judgment, with leave of the court, came too late after judgment was entered. The defendant was bound to know, when the court ordered the parties to proceed with the trial, that replications had not been filed to

its first and third pleas. It should then have asked for a rule upon the plaintiff to file replications. Its failure to do so was equivalent to consenting that the trial, so far as the pleadings were concerned, might be commenced." The opinion cites with approval Kelsey *v.* Lamb, 21 Ill. 559, where the Supreme Court of Illinois said: "If the defendant had filed his plea, and the other party fails to reply within the time required by the rules of the court, he has a right to judgment by default against the plaintiff, but, until he obtains such default, the pleas cannot be considered as confessed by the plaintiff. It is the default which gives the right to consider and act upon the pleas as true. In this case no default was taken. When the parties submitted the case to trial by the court, without a jury by consent, it had the effect of submitting the case to trial on the pleadings, as if there were proper issues formed, and the court will hear evidence under all the pleas presenting a legal defense precisely as if the allegations of such pleas had been formally traversed. This is the fair and reasonable construction to be given to such agreements. But it is otherwise where the party is compelled to proceed to trial without the issues being formed in the case. Then the act is not voluntarily, and no such intendment can be made." "The defendant here," continues Judge Harlan, "was compelled to proceed with the trial, but no objection was made by it to a trial because the issues were not fully made up."

In Bartley *v.* McKinney, 28 Grat. 750, Judge Moncure, delivered the unanimous opinion of the court, and we quote from the syllabus of that case as follows: "In an action of unlawful detainer, the defendant appears; but, though the case is continued for years, he does not file any plea. The cause is proceeded in precisely as if there was a plea filed—the jury are sworn to try the issue joined, and the defendant makes full defense. There having been a verdict and judgment in favor of the plaintiff, the defendant cannot set up the want of the plea and issue thereon in the appellate court." Judge Moncure, in the course of his opinion, quotes with approval a passage from the opinion by Judge Staples in Southside R. Co. *v.* Daniel, 20 Grat. 344, in which he says: " 'The spirit of the modern cases, and the disposition manifested by the courts to disregard mere technical objections, unless there be something omitted so essential to the action or defense that judgment according to law and the very right of the case cannot be given.' " "This," says Judge Moncure, "strongly applies to this case. But, without considering that question, we are of opinion that there is no errer in the judgment on the ground taken in the first assignment of error." "To permit a party to make such an objection for the first time in an appellate court." Judge Moncure further declares, "would be to allow him to take advantage of his own wrong, for had he

made it in the court below, while the cause was pending there it might, and no doubt would, at once have been removed. In fact, the defendant has sustained no injury by what has been done in the court below in that respect; and the case was tried precisely in the same manner and with the same effect as if the plea of not guilty had been put in, and issue thereon had been joined in the case."

In Briggs *v.* Cook, 99 Va. 273, 38 S. E. 148, which was a proceeding upon a motion, issue was joined upon the plea of non-assumpsit, but no replication was filed to a special plea of set-off under section 3299, Code 1887 [Va. Code 1904, p. 170], this court said that "the statute of jeofails does not apply to the omission to file such replications, and the failure entitles the defendant to nominal damages, but the defendant waives the irregularity by going to trial without it." And in the opinion it is said that "the defendant should have asked for a rule upon the plaintiff to file replications. Its failure to do so was equivalent to consenting to the trial, so far as the pleadings were concerned, might be commenced."

Preston *v.* Salem Improvement Co., 91 Va. 583, 22 S. E. 486, was a proceeding by motion under section 3211 of the Code of 1887 [Va. Code 1904, p. 1686]. When the case was called in court, the defendant declined to plead or tender any issue of fact, claiming the right, as it was summary proceeding, to go to trial without any formal pleadings, and to produce orally in the progress of the trial any defenses he might have. The court declined to allow a jury to be sworn until and unless some issue of fact was joined. The parties thereupon submitted the matters of law and fact arising in the case to the determination and judgment of the court, but without waiving the defendant's exception to the refusal of the court to allow a jury. The judgment was for the plaintiff, and the defendant obtained a writ of error from this court, and undertook to maintain the proposition that, having refused to plead when called upon to do so, he was entitled to a trial by jury without pleas; and thus made his own delinquency a ground for asking a reversal of the case. In the course of its opinion the court cites quite a number of authorities to show that a judgment given upon a verdict cannot be sustained when no issue has been joined, and the judgment of the circuit court was affirmed.

In Norfolk and Western Ry. Co. *v.* Coffey, 104 Va. 665, 51 S. E. 729, 52 S. E. 367, the court held that in an action at law the statute of jeofails does not cure the nonjoinder, or want of issue altogether, and no verdict or judgment can properly be rendered therein; but from the opinion in that case it appears that "both court and counsel were taken by surprise at the reliance of the defendant of the statute of limitations." After not

guilty was pleaded and the issue upon it was regularly made, the defendant in vacation filed in the clerk's office the plea of the statute of limitations, upon which no issue was joined; the plaintiff and the court being, as we have seen, in ignorance of its existence. It cannot be doubted that in this case no element of estoppel existed, for there can be no estoppel without knowledge. And so, too, of other cases in which this question has been raised in this court, and which will not be mentioned because it would needlessly protract this opinion; but we believe that, in every case in which the want of issue has been adjudged a ground for reversal, the facts upon an examination will be found to be wholly different from the case before us, and that in every case in which the parties were advised of the state of the pleadings and were permitted to present evidence in support of their respective contentions as though issues had been formally joined they have been held to be estopped from making the objection after verdict rendered, because in such case, to repeat the language of Bartley *v.* McKinney, supra, "the defendant has sustained no injury by what has been done by the court below in that respect."

Objection is taken to the pleas on the score of duplicity. It is true that a plea in abatement, which sets up two or more distinct and sufficient defenses, either of which, if true, would necessitate a finding in favor of the defendant tendering the plea, is bad for duplicity; but a plea to jurisdiction which fails to negative the several grounds of jurisdiction enumerated in the statute would be bad for insufficiency. To constitute a sufficient plea, every ground of jurisdiction enumerated in the statute must be negatived in the plea.

Coming, then, to consider the pleas upon their merits, we concur with the learned judge of the circuit court in the view taken by him, that process can only issue to another county when some jurisdictional fact exists under section 3214, Code 1904. Now, in the case before us, adopting the analysis of the circuit court, it appears (1) that the insurance company was the sole defendant; and (2) that the insured did not reside in the county of Frederick at the time of his death, nor at the date of the policy of insurance, nor, indeed, at any period of his existence, to which may be added that the defendant corporation is a nonresident; that its principal office is in the state of Indiana; and that its chief officer resides in the city of Indianapolis.

The pleas aver that the defendant company has no estate or debts due it within the jurisdiction of the court; and it is assigned as error of the judgment that there was no proof of this averment. The only way in which the existence of estate or debts due to the defendant corporation could affect the question of jurisdiction would be under the attachment laws, by virtue

of which jurisdiction over the particular subject, but not over the person of the defendant, could be acquired.

Section 2959, Code 1904, provides, in part, that if the defendant or one of the defendants is a foreign corporation or is not a resident of this state, and has estate or debts owing to it within the county or corporation in which the action is, or is sued with a defendant residing therein, or that the defendant, being a nonresident of this state, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or corporation in which the action is, upon the institution of any action at law accompanied by a proper affidavit, as prescribed in the preceding part of the section an attachment shall issue. But in the case before us the proceeding is manifestly not under the attachment law. The object of the suit was not to attach particular property, but to acquire general jurisdiction over the defendant, so as to authorize a personal judgment against it.

In Guarantee Company *v.* National Bank, 95 Va. 487, 28 S. E. 912, it is said: "The Guarantee Company being a foreign corporation, the circuit court of the city of Lynchburg could acquire jurisdiction of the suit against it only in some one of three ways: By the cause of action, or some part thereof, having arisen in the said city; by being sued with another who was a resident thereof; or by having estate of debts owing to it within the said city"—none of which conditions exist in this case.

A further objection to the pleas is that they do not give the plaintiff a better writ; and it is true, as a general rule, that a plea in abatement must show a more proper or sufficient jurisdiction in some other court of the state wherein the action is brought. But this requirement cannot avail where the plea shows a condition of facts under which no court in the state has jurisdiction.

We come, now, to the principal contention of plaintiff in error, as set forth in his petition: "The chief defense set up by the pleas in abatement is that no court in Virginia can entertain jurisdiction of a suit by a nonresident plaintiff on a contract not made in Virginia against a nonresident corporation, except by attachment of the nonresident's property, even though, as in this case, the defendant be a nonresident insurance company having an agent in this state on whom under the statute, process could be served. The claim of the plaintiff for jurisdiction, upon which he based his motion to reject the pleas in abatement, rests upon the ground that because no statute of Virginia gives to any particular court in Virginia jurisdiction over a suit against a nonresident corporation in favor of a nonresident plaintiff on a contract made out of the state that, therefore, under the provisions of the Constitution of the United States (article 4, § 2), coupled with the statute requiring such nonresident insurance company as the defendant to have agents within the state upon

whom process can be served, that any court of general jurisdiction in Virginia, from which process would be issued and be sent to be served on the statutory agent of such a corporation, has jurisdiction of such a suit."

In support of this proposition Reeves *v.* Southern Ry. Co., 121 Ga. 561, 49 S. E. 674, copiously annotated in 70 L. R. A. 513, is relied upon. That was an action brought in the city court of Atlanta by a plaintiff (whose residence does not appear in the case as reported) against a foreign railroad corporation doing business in the city of Atlanta. The defendant was duly served with process, according to the laws of the state of Georgia. The cause of action was a tort to property in the state of Alabama, consisting of injury to a horse; and the trial court had decided in favor of the railroad company, upon the authority of Bawknight *v.* Liverpool, L. & G. Ins. Co., 55 Ga. 194. That case was reviewed and overruled; the court holding that "a foreign corporation doing business in the state of Georgia and having agents located therein for this purpose may be sued and served in the same manner as domestic corporations upon any transitory cause of action, whether originating in this state or otherwise, and it is immaterial whether the plaintiff be a non-resident or a resident of this state, provided the enforcement of the cause of action would not be contrary to the laws and policy of this state." In the course of its opinion, the court said: "The fact that a corporation has no existence except in legal contemplation gave rise to the conception that its existence could not be legally recognized outside of the territorial jurisdiction of the lawmaking power which created it, and that, therefore, it was impossible for a corporation to migrate beyond the bounds of its creator. This conception resulted in the court's holding that the corporation could not be sued in a jurisdiction foreign to that which gave it existence. While, under this view, as a matter of theory the corporation did not migrate, yet as a matter of fact its officers and agents did; and contracts were made in its name, and wrongs committed by its officers and agents, in territory far more from that in which it was supposed to have its only legal existence. Great hardship and inconvenience resulted oftentimes from the application of this rule, which had the effect of compelling those who sought redress for breaches of contract and other legal wrongs against the corporation to bring their actions in the courts of the jurisdiction creating the corporation; the expenses of the remedy in many cases amounting to more than what would have been the fruits of recovery. The recognition of the hardship resulting from this rule brought about a modification of the rule to the extent that, where a foreign corporation located an agent and actually transacted business in a foreign jurisdiction, it so far acquired a residence in that juris-

diction as to make it amenable to the processes of the courts thereof on all causes of action originating within that jurisdiction. The rule was then further modified to the extent that, where the corporation had an agent and was doing business in a foreign jurisdiction, it might be sued upon any transitory cause of action by a citizen of the state in which the corporation was thus doing business. And in this country it followed from this rule that, if a resident was allowed to bring this suit, any citizen of the United States would, under the Constitution of the United States, have a similar right to bring suit.

In Green *v.* C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, it was held that: "While in case of diverse citizenship the suit may be brought in the circuit court for the district of the residence of either party, there must be service within the district; and, if the defendant is a nonresident corporation, service can only be made upon it if it is doing business in that district in such manner, and to such an extent, as to warrant the inference that it is present there through its agent. A railroad company which has no tracks within the district is not doing business therein, in the sense that liability for service is incurred because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic."

With the doctrine of these cases we concur—that a corporation may be sued upon a transitory cause of action wherever it is doing business in such a manner and to such an extent as to warrant the inference that, through its agents, it is there present. We further agree (through it is not necessary, perhaps, to decide it in this case) that by virtue of the Constitution of the United States (article 4, § 2) any citizen of the United States would have a similar right to bring suit.

It is to be observed that in Reeves *v.* Southern Ry. Co., supra, process was served upon the defendant in accordance with the laws of the state of Georgia, and the service was upon the agent in the district in which the corporation of which he was the agent was doing business, and doing business of such a character as to warrant the inference that through its agent it was there present.

It seems that service upon the statutory agent of a foreign insurance company is valid only so long as such company continues to do business in this state, and that, when such a company ceases to do business in this state, it is no longer amenable to the jurisdiction of its courts. See Millan *v.* Mut. Reserve Fund L. Ass'n (C. C.) 103 Fed. 764, and numerous cases there cited. But it is unnecessary to decide that point in this case, for, if all that is claimed by plaintiff in error with respect to the validity of the service upon the statutory agent be true, yet,

where none of the grounds of jurisdiction enumerated in sections 3214, 3215, Code 1904, are present, the suit must be brought in the city of Richmond, where the statutory agent resides, and process cannot be sent, as was done in this case, from the city of Winchester to be served in the city of Richmond, where the insurance company is the sole defendant, and is not sued along with a resident defendant, or upon a policy of insurance issued upon the life of a person residing, either at the date of his death or at the date of the policy, in the county of Frederick. See Warren *v.* Saunders, 27 Grat. 259.

We are of opinion that the judgment should be affirmed.

Affirmed.

NORFOLK & W. RY. CO. *v.* BONDURANT'S ADM'R.

Nov. 21, 1907.

[59 S. E. 1091.]

1. Master and Servant—Existence of Relation.—Whether a student locomotive fireman is an employee of the railroad depends upon the circumstances of the particular case.

2. Same—Obtaining Position by Fraud—Liability of Master for Injuries.—Where a minor by knowingly misrepresenting his age is accepted by a railroad as a student fireman, though the rules of the company prohibit the accepting of minors for train service, he is a trespasser, or at most a bare licensee, and not a servant, and the railroad is not liable for his death in a collision, since it would be liable only for injuries willfully or wantonly inflicted upon him.

3. Trial — Instructions — Conformity to Evidence. — Requested instructions, not based on the evidence, should not be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

4. Railroads—Care as to Licensees.—A railroad does not owe to a licensee the duty of employing competent servants to run its trains.

5. Writ of Error—Petition—Specification of Errors—Sufficiency.—Where the petition for a writ of error clearly points out the points relied on for reversal, and the instructions asked are covered by the bills of exceptions, it is sufficient, although it is not specifically stated in the petition that the ruling of the court upon any particular point is assigned as error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1961.]

Error to Circuit Court, Amherst County.

Action for death by the administrator of C. N. Bondurant